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IN THE

Supreme Court of the United States

GUY MITCHELL, *et al.*,

Petitioners,

v.

MARY L. HELMS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AVI CHAI FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a program under Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 7301, *et seq.*, which provides federal funds to state and local education agencies to purchase and lend neutral, secular, and nonreligious materials such as computers, software, and library books to public and nonpublic schools for use by the students attending those schools, and which allocates the funds on an equal per-student basis, regardless of the religious or secular character of the schools the students choose to attend, violates the Establishment Clause of the First Amendment.

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This *amicus curiae* brief is submitted in support of the petitioners. By letters filed with the Clerk of the Court, petitioners and respondents have consented to the filing of this brief.[1]

INTEREST OF THE AMICUS CURIAE

The AVI CHAI Foundation is a private foundation that was established and endowed in 1984 by Zalman C. Bernstein, of blessed memory. AVI CHAI's mission is to encourage Jews in the United States and Israel to become more deeply involved with Jewish learning, observance and the promotion of mutual understanding and sensitivity among Jews of different religious backgrounds.

In the United States, one of AVI CHAI's primary efforts has been to encourage the growing Jewish day school movement. Over the past 12 months, AVI CHAI has committed almost $28 million for this purpose. There are currently 185,000 American Jewish students enrolled, kindergarten through twelfth grade, in approximately 800 full-time Jewish day schools. These day schools provide comprehensive general-studies education that satisfies the educational requirements of the various States and prepares graduates for college and university. At the same time, these schools offer a range of Jewish studies, as well as a moral education rooted in Jewish values.

AVI CHAI has also invested in research on Jewish education. One study on the finances of Jewish day schools, conducted by Marvin Schick and Jeremy Dauber, showed that Jewish day schools are dramatically under-

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[1] As required by Rule 37.6 of this Court, we represent that no party or party's counsel authored this brief in whole or in part and no person or entity other than the *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

funded compared to their public school counterparts. On average, Jewish day schools have less funds available per student for religious and general studies combined than public schools do for general studies alone. Supreme Court decisions that have limited government support even for secular materials at parochial schools have had a damaging impact on Jewish day schools.

As an advocate for Jewish day schools, AVI CHAI seeks to expand state aid available for secular materials at parochial schools. Such an expansion can only enhance the quality of secular education at these schools.

THE NATURE OF THE FEDERAL AND STATE PROGRAMS THAT ARE AT ISSUE IN THIS CASE

A. Federal Grant Programs.

Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965 ("ESEA") is a federal grant program designed to improve educational opportunities by supporting innovative school programs, promoting promising reform initiatives, providing necessary educational materials, and meeting the needs of at-risk/high cost students. See 20 U.S.C. § 7301(b) (1994).[2] In 1981, Congress consolidated the more than forty categorical programs that now make up Chapter 2 into a single block grant program that provides funds to state and local education agencies ("SEAs" and "LEAs"). See SRI International, How Chapter 2 Operates at the Federal,

[2] In 1994, this program was redesignated as Title VI of the ESEA. The parties have continued to call the statutory provisions "Chapter 2" as they were designated prior to 1994, and we follow that nomenclature here.

State, and Local Levels 4 (1994) (hereafter "SRI Report"). The principal effects of the consolidation were to enhance local discretion in how funds were allocated, increase the breadth of distribution of funds to include private school students, and decrease administrative costs. See *id.*

Chapter 2 requires that LEAs allocate resources equitably between private and public school students. See 20 U.S.C. § 7372(b) (1994). Expenditures for private school students must "be equal (consistent with the number of children to be served) to expenditures for . . . children enrolled in the public schools . . . taking into account the needs of the individual children and other factors which relate to such expenditures . . . ." *Id.* State and local agencies that receive Chapter 2 funds must also engage in "meaningful consultation" with private school officials within their region to determine what services or benefits the private schools require. 34 C.F.R. § 299.6 (1998). If private school students or educational personnel have different and distinct needs from their public school counterparts, federal guidelines require that public agencies provide services and benefits for those unique needs. See 34 C.F.R. § 299.7 (1998).

Chapter 2 benefits are used by private schools to support a vast array of programs and services. Although only a relatively small percentage of Chapter 2 funds actually go to private schools (three percent of SEA funds and nine percent of LEA funds in 1991-92), the benefits provide an important source of funds and equipment for innovative new educational programs. See SRI Report at 198, 219. Chapter 2 effectively tripled the funds available to private schools as compared to previous programs. See *id.* at 206. In 1991-92, thirty-nine percent of the nation's school districts had private schools that were eligible to participate in Chapter 2, and sixty-six percent of those

LEAs actually supported private schools. See *id.* at 211. During the same period, thirty-four percent of private schools participated in Chapter 2 programs. See *id.* at 200.

Although virtually every aspect of elementary and secondary education is supported by Chapter 2 benefits, many private schools use the funds to acquire educational materials and computer equipment. See *id.* at 211. The most common use of Chapter 2 benefits – used in eighty-six percent of schools – is to purchase instructional and educational materials for libraries and media centers. See *id.* at 210. Additionally, more than forty percent of private schools use Chapter 2 funds to purchase computer hardware and software. See *id.* Chapter 2 benefits are also commonly used for staff development, programs for at-risk students, innovative programs, and general school-wide improvement. See *id.*

B. Federal Safeguards Against Use for Religious Indoctrination.

Chapter 2 and the Department of Education's associated implementing regulations contain substantive and procedural provisions designed to prevent the use of secular materials for religious indoctrination. Chapter 2 places two principal substantive restrictions on funds allocated to private schools. *First*, the expenditures must support "secular, neutral, and nonideological services, materials, and equipment." See 20 U.S.C. § 7372(a)(1) (1994). *Second*, the expenditures must supplement, rather than supplant, funding from non-federal sources. See 20 U.S.C. § 7371(b) (1994).

Chapter 2 also contains procedural requirements designed to prevent public funds from being employed by private schools for religious indoctrination. Title to all

materials and equipment purchased for private schools using Chapter 2 funds must remain with the public agency, which is also charged with maintaining administrative control over the materials. See 20 U.S.C. § 7372(c)(1) (1994). Department of Education regulations further dictate how materials purchased with Chapter 2 funds must be used, requiring that the supplies be used only for "proper purposes," that the materials can be easily removed, and that the materials are removed when they are no longer needed for the specific program for which they were purchased. See 34 C.F.R. § 299.9 (1998). Chapter 2 also requires that if a public agency contracts with an outside entity to provide services to private schools, the contracted entity must be wholly independent of any religious organization. See 20 U.S.C. § 7372(c)(2) (1994).

Further safeguards, although not dictated by federal statutes or regulations, are also commonly instituted by SEAs and LEAs. See SRI Report at 147-48. In order to receive Chapter 2 benefits that go to private schools, LEAs must submit applications to their respective SEAs. These applications include "statements of assurance (*e.g.*, community consultation), planned activities, program participant counts, a budget, and other attachments that the state may require." *Id.* at 125. State agencies review these applications, along with other LEA evaluations, as well as conducting periodic site visits to ensure compliance with federal and state regulations. See *id.* at 148-50. Finally, many SEAs and LEAs also require that materials purchased with Chapter 2 funds be conspicuously marked as such. See *id.* at 212. Although, for reasons stated at pp. 20-23, *infra*, we do not believe that these measures are constitutionally necessary, they reduce the possibility that secular materials provided by government will be used for religious indoctrination.

C. State Programs.

Nearly half of the States provide financial, material, or service benefits to non-public schools within their jurisdictions. See Education Commission of the States: Clearinghouse Notes, 1993-94 State Aid to Non-Public Schools 1 (September 1997) (hereafter "ECS State Aid"). There is significant variety in state programs, ranging from transportation services to grants for specific education programs. See *id.* at 6. Additionally, every State's constitution or legislative code has provisions that serve to guard against violations of the Establishment and Free Exercise Clauses of the United States Constitution. See Education Commission of the States: Clearinghouse Notes, State Constitutions and Public Education Governance 1-2 (June 1999).

Eighteen States have programs by which private school students are provided with textbooks. See Appendix I, pp. 1a-8a, *infra*. These programs vary significantly, but they generally provide either free or subsidized textbooks to approved private schools for non-religious courses of instruction. See, *e.g.*, Miss. Code Ann. § 37-43-1 (1972) (providing free state-owned textbooks to approved non-public schools); Ind. Code § 20-8.1-9-9.5 (1990) (reimbursing parents of non-public school children for textbooks when children are eligible for federal free lunch programs).

The next most common use of targeted public benefits for private schools is the provision of free transportation for students traveling to and from school. See ECS State Aid at 6. Fourteen States either provide free transportation or reimburse parents of children who attend private school for their transportation costs. See *id.* at 1-5. Common restrictions placed on the transportation benefits

often include that the private school be state-approved (see, e.g., Iowa Code § 285.1 (1997)) or that private school students not displace public school students on the buses (see, e.g., N.D. Cent. Code § 15-34.2-16 (1999)).

Several States provide funding or services for specific educational programs. Most commonly, States provide benefits for students who require special education when they are unable to attend public schools. See, e.g., Miss. Code Ann. § 37-23-69 (1972) (providing a graduated reimbursement rate for special education services); Wis. Stat. § 115.791 (1999) (providing procedures for full reimbursement of costs for non-public special education programs); N.C. Gen. Stat. § 115C-115 (1998) (providing public payment of tuition for private school special education programs when public facilities and personnel are unavailable). Additionally, States also offer special instruction to non-public school students who would, if in public schools, be eligible for "compensatory" programs to improve math or language skills. See, e.g., N.J. Stat. Ann. § 18A:46A-1, 4 (West 1999). Other specialized benefits include driver education (see Del. Code Ann. tit. 14, § 127 (1998)), violence prevention (see Minn. Stat. § 120B.22 (1998)), and drug, alcohol, and tobacco education (see N.J. Stat. Ann. 18A:40A-5 (West 1999)).

Some States also provide teaching materials other than textbooks to non-public schools. See, e.g., Ohio Rev. Code Ann. § 3317.06 (Anderson 1999) (providing secular, neutral, and nonideological software and video materials, and limited computer hardware to non-public schools). In some cases, States specifically distinguish between more traditional and non-technologically advanced instructional materials that can be provided, and computer software and hardware that cannot be given to non-public schools. See 22 Pa. Cons. Stat. § 115.1 (1999) (providing numerous

materials including compasses and protractors but not computer materials).

Several States provide for private schools to be reimbursed for costs imposed by state-mandated administrative and testing programs. See, e.g., Ohio Rev. Code Ann. § 3317.063 (Anderson 1999) (reimbursing private schools for clerical and administrative costs incurred due to state and local regulations). Similarly, some States reimburse private schools for costs associated with state free-meal programs for students, even when the programs are not required. See, e.g., 105 Ill. Comp. Stat. 125/2 (West 1998) (allowing reimbursement for non-profit private and parochial schools that participate in state free-breakfast and lunch programs).

Finally, a number of States provide funds for in-school medical care to non-public schools. See, e.g., N.J. Stat. Ann. § 18A:40-25 (West 1999) (providing nursing care); Conn. Gen. Stat. § 10-217a (1998) (mandating public provision of equivalent medical services for public and private school students). These statutes typically apply to both sectarian and non-sectarian institutions. See *id.* See Appendix II, p. 9a, *infra*, for a listing of the different categories of state assistance and an enumeration of the States that provide programs in each category.

SUMMARY OF ARGUMENT

There is universal agreement on one proposition regarding the present state of constitutional law under the Religion Clauses. It is that this Court's doctrine concerning permissible governmental aid to religious schools is "unprincipled, incoherent, and unworkable."[3] The gulf

[3] Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. 477, 478 & n.9 (1991).

between the views of the Fifth and Ninth Circuits on the issues currently before the Court is attributable largely to the erratic course this Court has followed in applying the Establishment Clause to government funding of various aspects of secular education provided in private religious schools. There is no discernible rational thread that connects *Everson v. Board of Education*, 330 U.S. 1 (1947), *Board of Education v. Allen*, 392 U.S. 236 (1968), *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Meek v. Pittenger*, 421 U.S. 349 (1975), *Wolman v. Walter*, 433 U.S. 229 (1977), and *Agostini v. Felton*, 521 U.S. 203 (1997). Each is a decision that, like a "restricted railroad ticket, [is] good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). Scholars of this Court's constitutional interpretation have also called the Court's record "a conceptual disaster area," Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools – An Update*, 75 Cal. L. Rev. 5, 6 (1987), and a "crazy quilt set of distinctions," Michael W. McConnell & Richard A. Posner, *An Economic Approach To Issues of Religious Freedom*, 56 U. Chi. L. Rev. 1, 25-26 (1989).

In this *amicus curiae* brief, we urge the Court not to attempt to reconcile hopelessly inconsistent precedents. The principles articulated in the Court's earliest decisions on the subject of governmental financial assistance to secular programs of religious schools provide comprehensible signposts that should have been followed in later decisons. The language of the Establishment Clause and its policies support a constitutional rule that implements doctrines articulated in this Court's early decisions – *Everson* and *Allen*. It does not support the decisions in *Meek* and

Wolman, and those decisions should be categorically overruled.

The constitutional litmus test should be nothing more and nothing less than the religious content of the commodity that is purchased with state money. Public funds may be used, we submit, to purchase, for religious schools among others, books, materials or supplies that have no intrinsic religious content. The governing rule should be this: If a program broadly benefits all schools – public and private, secular and sectarian – and is administered uniformly, neutrally and even-handedly, it may provide state-purchased secular books, materials and supplies even to "pervasively sectarian" schools. The possibility that such neutral non-denominational materials may be used by individual teachers in a religious school to inculcate religion is, we submit, a constitutional irrelevancy. The state has performed its constitutional duty once it ensures the non-religious *content* of the goods purchased with taxpayers' money. It is not the government's job to police how religious institutions *use* non-ideological commodities that the state purchases.

A government agency may, if it chooses, request an assurance from the institution that receives government funds (or from an individual recipient) that the funds will not be used for religious indoctrination. Such a representation, even if not constitutionally mandatory, is an additional safeguard against any possible violation of the Establishment Clause. But we believe that even in the absence of such assurances, the presumption that secular materials will be used for non-religious educational purposes suffices to pass constitutional muster.

In this brief, we first discuss the principles of *Everson* and *Allen* – the initial decisions that set discernible

guideposts in this area. Both cases upheld government funding of intrinsically secular services and materials – school-bus transportation and secular textbooks. Later decisions in *Meek* and *Wolman* unjustifiably eroded the relatively clear line that *Everson* and *Allen* had drawn.

The language and purpose of the Establishment Clause support distinguishing between what is permitted and what is forbidden on the exclusive basis of the *content* of the commodity or service that is provided. Government is not making any law "respecting the establishment of religion" when it purchases secular textbooks, laboratory equipment, maps and computers to be used in *all* schools, including religious schools. And there is no discrimination favoring religion or any appearance of endorsement of religion if *all* schools, religious and secular, are equally entitled to the benefits of such government programs.

The possibility that secular materials may be used by teachers or school administrators as part of a program of religious indoctrination does not invalidate a non-denominational, intrinsically secular program of state aid. This Court's most recent ruling in this area, *Agostini v. Felton*, 521 U.S. 203 (1997), rejects the hypothesis that produced some of the most difficult and confusing decisions of the Court in this area – *i.e.*, the concept that there is no legitimate secular education other than religious indoctrination in "pervasively sectarian" schools.

ARGUMENT

I

THIS COURT'S EARLY DECISIONS PERMITTED THE STATE TO PROVIDE RELIGIOUS SCHOOLS WITH SECULAR, NEUTRAL AND NONIDEOLOGICAL MATERIALS

The Court's majority opinion in *Lemon v. Kurtzman*, 403 U.S. 602, 616-17 (1971), summarized the law before 1970 as follows:

> Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause.

Although the particular program involved in *Everson v. Board of Education*, 330 U.S. 1 (1947), provided reimbursement for bus transportation "on regular busses operated by the public transportation system" (330 U.S. at 3), the state statute involved in *Everson* was not limited to public transportation. It authorized any "transportation . . . to and from school." See 330 U.S. 30, n.5. Hence, even a school bus designated for a particular parochial school that transported children to and from that school may constitutionally be financed out of tax revenues. The reason is, as the Court stated in its *Lemon* opinion, that bus transportation – like school lunches and health services

– is by its nature, secular and nonideological. See 403 U.S. at 617.

The Court explained in its *Everson* opinion that banning financial assistance for bus transportation would be tantamount to denying religious believers "the benefits of public welfare legislation" simply because of their faith or lack of it. 330 U.S. at 16. Bus transportation of children to and from school was viewed as a "general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." 330 U.S. at 18.

The Justices in the *Everson* majority were not oblivious to the argument forcefully made in Justice Rutledge's dissenting opinion (330 U.S. at 28-63). He argued that "transportation, where it is needed, is as essential to education as any other element" (330 U.S. at 47) and that transportation of students to a religious school is as essential as "the very teaching in the classroom or payment of the teacher's sustenance" (330 U.S. at 48). It was never suggested that the *possibility* that students might be indoctrinated in religion while they are on the bus – that they might sing hymns or recite prayers while traveling to or from school – would render a program of public financing unconstitutional.

By the same token, the Court held in *Board of Education v. Allen*, 392 U.S. 236 (1968), that governmental loans of secular textbooks to parochial-school students is constitutionally permissible. The Court recognized that parochial schools perform, "in addition to their sectarian function, the task of secular education." 392 U.S. at 248. The *Allen* Court explicitly rejected the proposition that "all teaching in a sectarian school is religious or that the processes of secular and religious

training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." *Ibid.* Justice Douglas' dissent (392 U.S. at 254-66) argued, at great length, that a textbook is at "the very heart of education in a parochial school." 392 U.S. at 257. But the majority looked not to the most extreme hypothetical religious use of the statute that could be imagined but to the secular books that routine application of the law contemplated. On this basis, the Court sustained the textbooks loan program.

The majority opinion in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), observed that the *Allen* Court "refused to make assumptions, on a meager record, about the religious content of the text-books that the State would be asked to provide." 403 U.S. at 617. The *Lemon* Court, however, distinguished between the "ideological character" of teachers and the "ideological character" of books. Whereas a textbook's content is ascertainable, a teacher's "handling of a subject" was held to be too susceptible to the religious indoctrination that is the primary mission of the sectarian school. On this account, the Court concluded in *Lemon* (403 U.S. at 617):

> We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education. The conflict of functions inheres in the situation.

Indeed, Chief Justice Burger's opinion in *Tilton v. Richardson*, 403 U.S. 672 (1971), which was a companion case to *Lemon v. Kurtzman*, explicitly noted the difference between objects such as textbooks or buildings that are intrinsically "nonideological" and "religiously neutral" and

the services of teachers, who may engage in religious instruction. 403 U.S. at 687-88.

The *Lemon* Court invalidated programs that provided for governmental financing of the salaries of teachers of secular subjects because of "the potential for impermissible fostering of religion." 403 U.S. at 619. But the *Lemon* Court never questioned the rationale of *Everson* and *Allen*, under which government funding of inherently secular services and materials such as bus-transportation and textbooks was constitutionally permissible even at sectarian schools.

II

MEEK AND *WOLMAN* WERE ERRONEOUSLY DECIDED AND SHOULD BE OVERRULED

The first decision of this Court that invalidated a government-financed program that provided secular, nonideological and neutral instructional materials to religious schools along with all other private and public schools was *Meek v. Pittenger*, 421 U.S. 349 (1975). At issue in that case was the state's purchase and distribution to private schools, including religious schools, of instructional materials such as books, periodicals, musical scores, maps, sound recordings, films, and videotapes, as well as instructional equipment such as projectors, recording equipment, laboratory equipment, and "any other educational secular, neutral, non-ideological equipment as may be of benefit to the instruction of non-public school children and are presently or hereafter provided for public school children . . . . " 421 U.S. at 355 n.4.

Two judges of the three-judge district court that passed on this statute (Circuit Judge Gibbons and District

Judge Bechtle) concluded that there is no constitutional distinction "between secular, neutral, nonideological textbooks, on the one hand, and secular, neutral, nonideological 'books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, . . . processed slides, transparencies, films, filmstrips, kinescopes, and videotapes' on the other." 374 F. Supp. 639, 659 (E.D. Pa. 1974) (ellipsis in original). The majority of the three-judge court then said (*Ibid*):

> If the public authorities can be trusted with selecting secular, neutral, nonideological textbooks for use by students in religious schools, they can be trusted to make the same judgment with respect to those instructional materials which in this nonsequential age have to some extent replaced textbooks as teaching media. As with textbooks, this statute is, from the point of view of primary effect, largely self-enforcing since by hypothesis the instructional materials will be the same as are made available in the public schools.

The district court went on to distinguish between "equipment which from its very nature is incapable of diversion to a religious purpose," such as laboratory and gymnasium equipment, and a projector, which could be used to show a religious film. Since the latter could "easily be adapted to a religious use," the district court found that it could not be constitutionally provided to religious schools. Equipment that is "self-policing," on the other hand, was found to be constitutionally permissible. 374 F. Supp. at 661.

Justices Rehnquist and White in their dissent agreed with the district court majority that there is no meaningful difference between the textbooks permitted by *Allen* and the instructional materials and equipment at issue in *Meek*. 421 U.S. at 391.[4] The majority of the Court in *Meek* disallowed the financing of instructional materials not because those materials could potentially be used for religious instruction, but because the "primary beneficiaries" of the instructional materials and equipment loan provisions were church-related or religiously affiliated schools. 421 U.S. at 364. The Court's opinion also noted that the religious schools provide an integrated secular and religious education, and that the purpose of the schools is to inculcate religious values and belief. 421 U.S. at 366.

In *Wolman v. Walter*, 433 U.S. 229 (1977), a majority of the Court invalidated a governmental loan of neutral and secular instructional materials and equipment because "it inescapably has the primary effect of providing a direct and substantial advancement of the sectarian enterprise." 433 U.S. at 250. Justices Rehnquist and White again dissented for the reasons they had stated in prior opinions (433 U.S. at 255), and Justice Powell also noted that *Allen*, which is still good law, would sustain governmental loans of materials that are "incapable of diversion to religious uses." 433 U.S. at 263.

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[4] Since there was no cross-petition for a writ of certiorari to review the aspect of the district court's decision that had invalidated the state's provision of non "self-policing" equipment such as projectors, the dissenting Justices had no occasion to consider the "self-policing" line formulated by the district court. We believe, however, that the First Amendment does not prohibit governmental sponsorship of *any* nonideological material, whether or not it is "self-policing."

Both *Meek* and *Wolman* were, we submit, unjustified departures from the clear lessons of *Everson* and *Allen*. Materials and equipment that are, on their face, devoid of any religious content are indistinguishable from bus transportation and secular textbooks. This is true even if the materials and equipment could occasionally be "diverted" to some religious use – and is certainly true if they are "self-policing" and cannot, under ordinary circumstances, be used for religious indoctrination.[5]

The prohibition of the Establishment Clause is not designed to forbid religious schools from using ordinary secular objects as a means of teaching religious values. Common natural phenomena can be used to convey religious messages. If the students eat sandwiches for lunch, they may make a blessing over the bread. Neither the blessing nor the teaching of *Deuteronomy* (8:3) that "man does not live by bread alone" turns a publicly financed school lunch into a governmentally forbidden tool of religious indoctrination.

Nor must a literary classic be banned because a teacher may use it for a religiously related message. If Shakespeare's *King Lear* is utilized to teach the religious duty under the Fifth Commandment to honor one's father, the classic text, universally admired for its secular worth, is not to be embargoed at all parochial schools.

The prohibition against governmental action "respecting an establishment of religion" cannot reach

[5] The district court observed in *Meek* that a religious teacher could conceivably store holy water in a chemistry laboratory beaker, but discounted this aberrational use in its constitutional appraisal. 374 F. Supp. at 660.

governmentally financed materials that are totally devoid of religious content simply because private teachers of religion can use those materials to indoctrinate. The religion, in any such instance, is being provided by the private teacher, not by the governmental agency.

The error of the *Meek* and *Wolman* decisions and the absurd consequences of their holdings was tellingly summarized in Chief Justice Rehnquist's dissent in *Wallace v. Jaffree*, 472 U.S. 38 (1985), when he compared what is now permissible under *Everson* and *Allen* and what is forbidden by *Meek* and *Wolman* (472 U.S. at 110-11, footnotes omitted):

> For example, a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools, but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip.

In each of the prohibited instances mentioned in the list quoted above (and in many of the others that follow in the dissent's enumeration of anomalies), the precedent that is cited is either *Meek* or *Wolman*. These two decisions

have done incalculable harm not only to almost a quarter-century of students attending religious schools but also to all efforts to ascribe rationality to this Court's constitutional doctrine on permissible governmental aid to religious schools.

III

THE LANGUAGE AND PURPOSE OF THE ESTABLISHMENT CLAUSE DO NOT PROHIBIT GOVERNMENTAL CONDUCT OR EXPENSE THAT IS SECULAR AND NONIDEOLOGICAL

The fundamental error of *Meek*, *Wolman*, and the cases that have followed the rationale of those decisions is that they have prohibited government agencies from sponsoring materials or engaging in conduct that is not intrinsically and on its face religious. In *Meek* and *Wolman*, as in the now-repudiated rulings of *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), a majority of the Court disapproved of state-financed educational programs that assisted religious schools even though the programs were, in and of themselves, secular, neutral and nonideological. The ground stated by the Court was that the administration of the secular programs raised concerns regarding their "primary effect" on religion or possible "entanglement" with religious groups.

The Establishment Clause of the First Amendment was never intended, however, to foreclose secular government programs merely because they might be used by churches or private individuals to foster religion. The legislative history of the Establishment Clause was thoroughly reviewed and described in now-Chief Justice

Rehnquist's dissenting opinion in *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985). The Chief Justice's conclusion that James Madison, rather than Thomas Jefferson, should be viewed as the principal architect of the First Amendment's Religion Clauses might be open to debate, but it is indisputable that the language of the Establishment Clause never reached beyond government action that, in and of itself, promoted or hindered religion. Indeed, the final two versions of the Religion Clauses emanating in 1789 from the House and the Senate that were ultimately compromised, following conference, into the current version of the first 16 words of the Bill of Rights were (472 U.S. at 97):

> *House version*: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."
>
> *Senate version*: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."

By no stretch of the imagination could either of these provisions be interpreted as prohibiting government from providing secular classroom materials – or even a movie projector – to a religious school. Such action neither "establishes religion" nor "establishes articles of faith or a mode of worship." Indeed, James Madison's explanation of the initial draft of the Religion Clauses stated that its purpose was "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." See 1 Annals of Congress 730 (J. Gales ed., 1834) (Aug. 15, 1789), quoted and discussed in Michael

W. McConnell, *The Origins of the Religion Clause of the Constitution: Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933, 936-37 (1986). See also Mary Ann Glendon & Paul F. Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. 477 (1991).

When a State provides a secular textbook devoid of religious content or a map or laboratory equipment or a computer to a school where religion is taught on the same basis as it provides the same materials to public or secular private schools, the State is not establishing any article of faith or any religion. The possibility that a teacher in the religious school may use the state-provided material for religious indoctrination does not invalidate the State's even-handed distribution of *secular* educational materials. And nothing in the language or history of the Establishment Clause supports the proposition that neutral material that the State even-handedly provides becomes constitutionally suspect because a religious teacher may thereafter use it for religious indoctrination.

IV

AGOSTINI HAS REPUDIATED THE "PRESUMPTION OF INCULCATION"

Meek and *Wolman* were based on a premise that was repudiated and overruled by the Court in *Agostini v. Felton*, 521 U.S. 203 (1997). The Court majority observed in *Agostini* that "government inculcation of religious beliefs has the impermissible effect of advancing religion." 521 U.S. at 223. But the Court held that no presumption of inculcation or "taint" can be drawn from the mere fact that a secular government employee is found in religious surroundings. The majority in *Agostini* held that this Court's decision in *Zobrest v. Catalina Foothills School*

Dist., 509 U.S. 1 (1993), had "expressly rejected the notion . . . that, solely because of her presence on private school property, a public employee will be presumed to inculcate religion in the students." 521 U.S. at 224. Instead of looking to the location where the government-financed employee is found, the *Agostini* majority looked to the nature of the employee herself. On this account, the Court said, it was generally true that "public employees will not be presumed to inculcate religion" even in the surroundings of a religious school. 521 U.S. at 225.

Chief Justice Burger made the same point in *Tilton v. Richardson*, 403 U.S. 672 (1971), decided together with *Lemon v. Kurtzman*, when he said that the Court in the *Allen* case "refused to assume that religiosity in parochial elementary and secondary schools necessarily permeates the secular education that they provide." 403 U.S. at 681.

By the same token, secular textbooks or other secular materials or equipment cannot be presumed to be used "to inculcate religion" even if they are given by government to religious schools. Jewish day schools customarily teach secular subjects in an objective secular manner. History, foreign language, science and mathematics are not used to indoctrinate the students in religious dogma or practice. Instead, they are taught in a non-ideological fashion, albeit in the context of a school day during which the students are also given extensive teaching and training in religious subjects. Students in these schools appreciate that their Jewish religious education is as important as their secular studies, and they see that secular subjects can be studied intensively even while one is fully committed to the observance of traditional Judaism. But the secular teaching is not diluted or altered in order to conform to religious dogma.

V

THE "PERVASIVELY SECTARIAN" NATURE OF THE RECIPIENT SCHOOL SHOULD BE CONSTITUTIONALLY IRRELEVANT

Dissenting from a denial of certiorari, Justice Thomas noted in *Columbia Union College v. Clark*, 119 S. Ct. 2357 (1999), that the characterization of schools receiving governmental assistance as "pervasively sectarian" should be "scrapped." He noted that distinguishing between institutions on the basis of this standard – *i.e.*, placing schools in a particularly constitutionally suspect category if they "consider their religious and educational missions indivisible and therefore require religion to permeate all activities" (119 S. Ct. at 2357) – was tantamount to invidious religious discrimination.

Justices Kennedy and Scalia, concurring in *Bowen v. Kendrick*, 487 U.S. 589, 624 (1988), made a substantially similar point. They said that the issue in a constitutional challenge to a program of public benefits that are made available to religious institutions "is not whether the entity is of a religious character, but how it spends its grant." 487 U.S. at 624-25.

The constitutional rule we are urging in this case turns *entirely* on the nature of the materials that government provides; it does not depend at all on the character of the recipient – whether or not it is a "pervasively sectarian" institution. This is, we submit, the salutary rule. The constitutionality of the Chapter 2 program and of other governmental programs that provide secular, neutral and nonideological materials and equipment to public and private schools should not depend on the character of the

recipients. It should depend *only* on the content of the materials that government is providing. Such a rule would consign the "pervasively sectarian" characterization to the scrap-pile, which is where it belongs.

CONCLUSION

For the foregoing reasons, *Meek* and *Wolman* should be overruled and the judgment of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX I (Benefits Provided by States)

Note: Because all States provide private school special education benefits, the applicable statutory provisions are not included in this table.

STATE	SERVICES	STATUTORY REF.
Alabama	• None	-
Alaska	• None	-
Arizona	• None	-
Arkansas	• None	-
California	• None	-
Colorado	• None	-
Connecticut	1. Transportation 2. Textbooks 3. Medical care 4. Breakfast and lunch programs	1. Conn. Gen. Stat. § 10-281 (1999) 2. § 10-228a 3. § 10-217a 4. § 10-215a-b
Delaware	1. Transportation 2. Driver education	1. Del. Code Ann. tit. 14, § 2905 (1998) 2. tit. 14, § 127
Florida	• None	-
Georgia	• None	-
Hawaii	• None	-
Idaho	• None	-

Illinois	1. Transportation 2. Textbooks 3. Free lunch program	1. 105 Ill. Comp. Stat. 5/29-4 (West 1999) 2. 105 Ill. Comp. Stat. 5/18-17 3. 105 Ill. Comp. Stat. 125/5
Indiana	1. Textbooks 2. Teacher training	1. Ind. Code § 20-8.1-9-9.5(1998) 2. Section 20-6.1-8-1 to 21
Iowa	1. Transportation 2. Textbooks 3. Free meal program	1. Iowa Code § 285.1 (1997) 2. § 301.30 3. § 283A.10
Kansas	1. Transportation and auxiliary services (psychological, speech, hearing, and exceptional student programs)	1. Kan. Stat. Ann. § 72-5393 (1997)
Kentucky	1. Textbooks 2. Teacher training	1. Ky. Rev. Stat. Ann. § 171.215 (Michie 1998) 2. § 161.030

Louisiana	1. Transportation 2. Textbooks and instructional material (does not define term) 3. State administrative programs	1. La. Rev. Stat. Ann. § 17:158 (West 1999) 2. § 17:353 3. §17:361
Maine	1. Tuitioning (only for non-sectarian private schools)	1. Me. Rev. Stat. Ann. tit. 20-A, § 2951 (West 1998)
Maryland	• None	-
Massachusetts	• None	-
Michigan	1. Transportation 2. School bus driver training	1. Mich. Comp. Laws Ann. § 380.1321 (West 1999) 2. § 388.1674

Minnesota	1. State income tax credit 2. Textbooks 3. Technology access (allowing private schools to access statewide school technology network but requiring private school to pay for cost of access) 4. Violence prevention education 5. Health education 6. English non-proficiency	1. Minn. Stat. Ann. § 290.0674 (West 1998) 2. § 123B.42 3. § 125B.20 4. § 120B.22 5. § 121A.23 6. § 124D.65
Mississippi	1. Textbooks	1. Miss. Code Ann. § 37-43-1 (1998)
Missouri	1. Drop-out prevention	1. Mo. Rev. Stat. § 167.280 (1999)
Montana	• None	-
Nebraska	1. Textbooks	1. Neb. Rev. Stat. § 79-734 (1998)
Nevada	• None	-

New Hampshire	1. Transportation 2. Textbooks (including "instructional material," but statute does not define the term) 3. Medical care 4. Testing services 5. Driver education	• N.H. Rev. Stat. Ann. § 189:49 (1999)
New Jersey	1. Transportation 2. Textbooks 3. Compensatory services 4. Drug, alcohol, and tobacco education 5. Medical care 6. Technology improvement	1. N.J. Stat. Ann. § 18A:39-1.1 (West 1999) 2. § 18A:58-37.4 3. § 18A:46A-1 4. § 18A:40A-5 5. § 18A:40-25 6. line-by-line expenditure

New Mexico	1. Textbooks (includes "other educational media," but does not include computer software and hardware that is included under the "Education Technology Fund." The Education Technology Fund excludes non-public schools.)	1. N.M. Stat. Ann. § 12-15-7 (Michie 1978) (expired)
New York	1. Transportation 2. Textbooks	1. N.Y. Educ. Law § 3635 (Consol. 1999) 2. § 701
North Carolina	• None	-
North Dakota	1. Transportation	1. N.D. Cent. Code § 15-34.2-16 (1999)
Ohio	1. Cleveland Voucher Program (effective June 29, 1999) 2. Textbooks 3. Administrative program reimbursement	1. House Bill 282, 123rd G.A., Reg. Sess. (Ohio 1999) 2. Ohio Rev. Code Ann. § 3317.06 (Anderson 1999) 3. § 3317.063
Oklahoma	• None	-

Oregon	• None	-
Pennsylvania	1. Textbooks and supplies (excluding computer materials and other technology) 2. Auxiliary services (special education and remedial programs)	1. 22 Pa. Cons. Stat. § 115.1 (1999) 2. § 112.1
Rhode Island	1. Transportation 2. Textbooks	1. R.I. Gen. Laws § 16-23-2 (1998) 2. § 16-21-1
South Carolina	• None	-
South Dakota	1. Textbooks	1. S.D. Codified Laws § 13-34-16.3 (Michie 1999)
Tennessee	• None	-
Texas	• None	-
Utah	• None	-
Vermont	1. Tuition (excluding parochial schools)	1. Vt. Stat. Ann. tit. 16, § 21 (1999)
Virginia	• None	-
Washington	1. Transportation 2. Substance abuse education	1. Wash. Rev. Code § 28A.160.020 (1999) 2. § 28A.170.090

West Virginia	1. Textbooks	1. W. Va. Code § 18-5-21b (1999)
Wisconsin	1. Milwaukee voucher program 2. Transportation 3. Technology grants	1. Wis. Stat. § 119.23 (1998) 2. § 121.54 3. § 196.218
Wyoming	• None	-

APPENDIX II (Benefits Provided by Type)

Transportation	Connecticut, Delaware, Illinois, Iowa, Louisiana, Michigan, New Hampshire, New Jersey, New York, North Dakota, Rhode Island, Washington, Wisconsin
Textbooks	Connecticut, Illinois, Indiana, Iowa, Kentucky, Louisiana, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, South Dakota, West Virginia
Computers/Software	Minnesota, New Jersey, New Mexico, Wisconsin
Other Instructional Materials	Louisiana, New Mexico, Pennsylvania
Substance Abuse Education / Driver Education	Delaware, Michigan, New Hampshire, New Jersey, Washington
Auxiliary Services (English as a second language, remedial instruction)	Kansas, Minnesota, Missouri, New Jersey, Pennsylvania
Staff Training	Indiana, Kentucky, Michigan
State Administrative Programs	Louisiana, New Hampshire, Ohio
Medical Care	Connecticut, New Hampshire